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16 *Attorneys for Defendants*

17
18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

20
21 MASIMO CORPORATION,
22 Plaintiff,

23 vs.

24 POLITAN CAPITAL
25 MANAGEMENT LP, et al.,
26 Defendants.

Case No. 8:24-cv-01568-JVS-JDE

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S *EX PARTE*
APPLICATION FOR AN ORDER
FINDING DEFENDANTS IN
CONTEMPT**

Judge: Hon. James V. Selna
Ctm: 10C

Filed concurrently: Swartz Decl.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Dissatisfied with the outcome of its bid to stop the upcoming shareholder
4 vote, Masimo resorts to a motion for a contempt order seeking extraordinary relief: a
5 broad restraint against Politan’s exercise of its speech rights that would bar Politan
6 from making “any further statements regarding the [Court’s] order” in these critical
7 days leading up to the shareholder vote; as well as a *one-week* delay of the
8 shareholder vote. Masimo justifies these extreme remedies by its claimed need to
9 “correct the false impression that Defendants have now created” by its “one-sided
10 view of the ruling.” But the disclosure about which it complains is undeniably true
11 and not confidential or proprietary in any way: Politan’s press release states that the
12 Court denied Masimo’s motion for a preliminary injunction and noted that the order
13 remained under seal. That is not false, misleading, or any basis for the sanctions
14 Masimo seeks. Nor is the disposition of the Court’s ruling confidential or
15 proprietary information that Masimo is entitled to control. The fact of the Court’s
16 order is on the public docket. The prejudice about which Masimo complains flows
17 from the Court’s denial of its motion—not from any purported violation of a court
18 order by Defendants.

19 Masimo has not come close to meeting its high burden of showing that
20 Politan violated a specific and definite order of the court justifying contempt. The
21 Court’s order is sealed but does not prohibit the disclosure of the outcome of the
22 motion. Politan took care to ensure that its press release did not disclose any
23 confidential information. Politan’s press release did not discuss or describe the
24 contents of the Court’s order. The press release does not allude to any particular
25 court findings or rationale. Politan expressly acknowledged in the press release that
26 the order remained under seal. (*See Swartz Decl., Ex. 1.*)

27 Masimo, on the other hand, took no such care. Masimo issued its own press
28 release this morning falsely implying that the Court *granted* the injunction and made

1 specific Court findings in the sealed order, suggesting that the Court ordered Politan
2 to make certain corrective disclosures. (*Id.* Ex. 2.) Masimo’s press release this
3 morning asserted that its “lawsuit *forced* Politan and Quentin Koffey to issue
4 corrective disclosures on *false and misleading statements* made to Masimo
5 stockholders on issues *material* to the proxy contest.” (*Id.* Ex. 2 (cleaned up;
6 emphasis added).) It described those allegedly “false and misleading statements” in
7 detail, enumerating its unsubstantiated claims that “Politan and Quentin Koffey lied
8 about the Spin-Off,” the “Board’s role in the Sale Process,” and the “Outcome of the
9 Sale Process.” (*Id.*) [REDACTED]

10 [REDACTED]
11 [REDACTED] The unmistakable implication of
12 Masimo’s misleading press release is that the Court found those three statements
13 “false and misleading” in its final order and issued an injunction “forc[ing]” Politan
14 to issue corrective disclosures. Masimo’s suggestion that its “hands were tied” with
15 respect to any response rings hollow, and it is Politan that is actually prejudiced by
16 the inability to respond to Masimo’s misleading statements.

17 The Court should deny the *ex parte*.

18 **II. BACKGROUND**

19 On Monday, September 9, the Court held a public hearing on Masimo’s
20 motion for preliminary injunction. (Dkt. 194.) At no point did either party move to
21 seal the courtroom, despite engaging in lengthy and detailed discussion of the
22 Court’s tentative order, which was issued under seal. Instead, both parties provided
23 the Court hard copies of their presentation decks containing confidential or AEO
24 materials and avoided mentioning in open court any of the confidential information.
25 (*See* 9/9/2024 Hr’g Tr. at 1:22-25.)¹ At the conclusion of the hearing, counsel for
26

27 _____
28 ¹ The final transcript of the hearing is not yet available. Citations are to the
currently-available draft transcript.

1 Masimo asked as a “housekeeping note” that that Court consider maintaining under
2 seal “just the names of the confidential witnesses from the securities case and the
3 name of the JV partner” in its public order. (*Id.* at 55:8-15.)

4 The Court issued its order denying the preliminary injunction motion on
5 Wednesday, September 12. (Dkt. No. 201.) The order was issued under seal, and

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]. It does not specifically or definitely prohibit disclosure of its disposition.

9 The following morning, Politan and Masimo each issued press releases. (*See*
10 Swartz Decl., Exs. 1, 2.) Before Politan published its release, it asked counsel to
11 review the release and confirm the information contained therein could be publicly
12 disclosed; counsel reviewed before publication. (Swartz Decl. ¶ 9.) Politan’s press
13 release was matter-of-fact, stating that the Court had issued an order denying the
14 motion for a preliminary injunction, such that shareholders should expect the vote to
15 proceed as scheduled. Politan expressly noted that the substance of the Court’s
16 order remained under seal for the time being. (Ex. 1.)

17 Masimo was not so reserved. As it has throughout this litigation, *see id.* Exs.
18 3-4, Masimo provided its preemptive commentary on the lawsuit. It stated that its
19 lawsuit “forced” Politan and Quentin Koffey to “Issue Corrective Disclosures on
20 False and Misleading Statements ... on Issues Material to the Proxy Contest.” (*Id.*
21 Ex. 2.)

22 Shortly before filing this *ex parte* application, counsel for Masimo contacted
23 counsel for Politan to “demand that your client immediately retract the press
24 release” and stated, prior to any attempts to meet and confer, that Masimo would be
25 moving *ex parte* for sanctions. (*Id.* Ex. 7 [Connelly 9/12 7:24 AM PT email].
26 Masimo initially refused to identify what portions of the Politan press release it
27 believed revealed any of the substance of the Court’s order, and did not state a basis
28 for any belief that the fact of the order, rather than its contents, was confidential or

1 proprietary. (*See id.*) Masimo’s counsel has since made clear that its only objection
2 to Politan’s press release is the disclosure of the “ruling itself.” (*Id.* Ex. 7 [Connelly
3 9/12 11:32 AM PT email].)

4 At 10:33 AM PT this morning, over an hour before Masimo filed this *ex parte*
5 application, Defendants sent Plaintiff a proposed highlighted version of the Court’s
6 order for redactions. (*Id.* Exs. 5-6.) Defendants’ proposed redactions mirror the
7 limited pieces of information that Masimo identified at the hearing as requiring
8 redaction. (See *id.* Ex. 6; 9/9/2024 Hr’g Tr. at 55:8-15.) But rather than facilitate
9 public dissemination of the Court’s decision, Masimo chose to seek to manufacture
10 an issue where there is none in an effort to gain an unwarranted strategic advantage
11 in the upcoming election. Masimo indicated that it was unsatisfied and would be
12 proceeding to file this application. (Swartz Decl., Ex. 7 [Connelly 9/12 10:56 AM
13 PT email].)

14 **III. LEGAL STANDARD**

15 *Ex parte* applications are “rarely justified.” *Mission Power Eng’g Co. v.*
16 *Cont’l Cas. Co.*, 883 F. Supp. 488, 490 (C.D. Cal. 1995). To justify *ex parte* relief,
17 the moving party must establish: (1) “that the moving party’s cause will be
18 irreparably prejudiced if the underlying motion is heard according to regular noticed
19 motion procedures”; and (2) “that the moving party is without fault in creating the
20 crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable
21 neglect.” *Id.* at 492.

22 To justify a civil contempt finding, the party seeking the finding bears the
23 burden of showing through clear and convincing evidence that the party to be held
24 in contempt “violated a specific and definite order of the court.” *FTC v. Affordable*
25 *Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). “[A] person should not be held
26 in contempt if his action ‘appears to be based on a good faith and reasonable
27 interpretation of the [court’s order].’” *In re Dual-Deck Video Cassette Recorder*
28 *Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (quoting *Vertex Distrib., Inc. v.*

1 *Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)). “‘Substantial
2 compliance’ with the court order is a defense to civil contempt, and is not vitiated by
3 ‘a few technical violations’ where every reasonable effort has been made to
4 comply.” *Id.*

5 **IV. ARGUMENT**

6 **A. Any Delay of the Shareholder Vote Would Be Improper and** 7 **Severely Prejudicial**

8 This *ex parte* application is a transparent attempt to obtain the relief that
9 Masimo failed to obtain through its preliminary injunction motion.

10 Following its order granting Masimo’s request for expedited briefing,
11 extensive discovery, a lengthy, reasoned tentative, and a full hearing attended by the
12 press during which both sides presented argument, the Court denied Masimo’s
13 motion. [REDACTED]

14 [REDACTED]. See *Mills v. Elec.*
15 *Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (Section 14(a) “stemmed from a
16 congressional belief that ... corporate suffrage is an important right ... [and] was
17 intended to promote the free exercise of the voting rights of stockholders”). If the
18 Court grants Masimo’s *ex parte* application to delay the annual meeting now, it
19 would be giving Masimo the very relief that it has already denied.

20 Defendants would be severely prejudiced by any action that delays the
21 already postponed annual meeting and their opportunity, consistent with their basic
22 franchise rights, to vote on the candidates for Masimo’s board. Defendants have
23 expended considerable time, money, and effort engaging openly in the proxy
24 process, issuing supplemental disclosures, and litigating this case.

25 Masimo, conversely, suffers no cognizable harm from a timely annual
26 meeting. See, e.g., *Eisner v. Meta Platforms, Inc.*, 2024 WL 3228089, at *7 (N.D.
27 Cal. June 28, 2024) (noting equitable relief not justified in Section 14(a) context
28 because defendant had “had already expended significant resources with the

1 expectation that the meeting would go forward as planned” and [b]y contrast,
2 Plaintiff suffered no obvious harm by the meeting and votes going forward as
3 planned”).

4 **B. Masimo Fails To Satisfy Its Burden to Show that Politan Has Done**
5 **Anything to Justify Civil Contempt**

6 Masimo’s motion fails to satisfy the high standard for civil contempt. As an
7 initial matter, Masimo fails to identify any “specific and definite” part of the Court’s
8 order that Politan’s careful statement allegedly violated. *Affordable Media, LLC*,
9 179 F.3d at 1239. Nor does Masimo come close to showing that Politan’s narrow
10 disclosure, as explained by counsel, was not “based on a good faith and reasonable
11 interpretation of the [court’s order]” or that it did not “substantial[ly] compl[y]” with
12 the sealed nature of the Court’s Order. *In re Dual-Deck Video*, 10 F.3d at 695.

13 Unlike Masimo, Politan took care to observe and acknowledge the sealed
14 nature of the Court’s order when it issued a press release that expressly did not
15 comment on the underlying substance of the Court’s reasoning, findings, or any
16 other information designated confidential by the parties. Politan first checked with
17 counsel before publishing anything. (Swartz Decl. ¶ 9.) Its release disclosed only
18 the outcome of the Court’s ruling: the denial of the preliminary injunction motion
19 and the fact it was sealed, nothing more. (See Swartz Decl., Ex. 1.) The ultimate
20 disposition of the Court’s ruling is not “one-sided” or confidential. Masimo has
21 offered no substantive explanation as to why it would be confidential. As Masimo
22 itself stated at the hearing, the only information it regards as confidential are the
23 identities of certain confidential witnesses and the joint venture partner, neither of
24 which are identified or discussed in Politan’s press release. (See *id.*; 9/9/2024 Hr’g
25 Tr. at 55:8-15.)

26 By contrast, Masimo’s own press release directly alluded to the contents of
27 the Court’s sealed order, indeed, created a misleading impression that the Court
28

1 granted the injunction. (*See* Swartz Decl. Ex. 2.) If anything, Masimo’s press
2 release created a distorted view of the Court’s ruling.

3 **C. The Relief Masimo Seeks Is Overbroad and Improper**

4 The sweeping relief Masimo seeks is neither calibrated to coerce obedience
5 with any order of the Court or to compensate Masimo for any non-illusory harm.
6 Sanctions for civil contempt may be imposed to “coerce obedience to a court order,
7 or to compensate the party pursuing the contempt action for injuries resulting from
8 the contemptuous behavior.” *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376,
9 1380 (9th Cir. 1986) (citing *United States v. United Mine Workers*, 330 U.S. 258,
10 303–04 (1947)). Here, Masimo transparently seeks—without any supporting
11 authority—relief intended only to advance its interests in the ongoing proxy contest.

12 **1. A Week Delay in the Shareholder Meeting Would Not**
13 **Redress Masimo’s Purported Injury**

14 Masimo’s claimed injuries do not justify the sweeping relief it seeks. Masimo
15 points to an article reporting that the Court “denied an effort by Masimo” to block
16 the upcoming director contest and demands a *week-long* delay of the shareholder
17 vote, claiming that such time would give Masimo “an opportunity to correct the
18 false impression that Defendants have now created, and so the stockholders can
19 have an opportunity to digest the corrected record.” (Dkt. 202 at 4.) Defendants did
20 not create any “false impression.” Instead, Defendants merely stated the objective
21 and simple fact that the Court denied Masimo’s motion. Being forced to face the
22 inevitable press coverage of Masimo’s failed preliminary injunction motion is not
23 prejudice.

24 Masimo’s argument that stockholders need “an opportunity to digest the
25 corrected record” likewise falters, because there is nothing to correct. The Court
26 will issue a public version of its order, [REDACTED]

27 [REDACTED] That is in advance of the
28 shareholder meeting on September 19, 2024. Shareholders will see the Court’s full

1 reasoning at that time. They should not be forced to undergo the confusion and
2 tumult of a new shareholder meeting for the stated purpose of “digest[ing]”
3 Masimo’s characterizations of the order, which speaks for itself.

4 **2. Masimo Seeks an Impermissible Prior Restraint on Politan’s** 5 **Speech**

6 Masimo’s requested relief also constitutes an impermissible and
7 unconstitutional prior restraint on Politan’s speech in the key days ahead of the
8 contested proxy vote. *See Alexander v. United States*, 509 U.S. 544, 550 (1993)
9 (“[C]ourt orders that actually forbid speech activities—are classic examples of prior
10 restraints.”). Masimo demands a Court order broadly to “restrain Defendants from
11 issuing any further statements regarding the order until after the sealing issues have
12 been addressed.” (Dkt. 202 at 4). Masimo’s proposed restriction purports to bar
13 Defendants from commenting on anything relating to the order, including public
14 information regarding the *fact* or timing of the order. As the Supreme Court has
15 repeatedly emphasized, “prior restraints on speech and publication are the most
16 serious and the least tolerable infringement on First Amendment rights.” *Nebraska*
17 *Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976). A prior restraint, “by definition,
18 has an immediate and irreversible sanction” in “chill[ing]” speech, *id.*, and “bear[s]
19 a heavy presumption against its constitutional validity,” *Capital Cities Media, Inc. v.*
20 *Toole*, 463 U.S. 1303, 1305 (1983) (citation omitted). Masimo’s prior restraint is
21 especially inappropriate given the context of the ongoing proxy contest—with the
22 annual meeting now less than a week away. Depriving Politan of the opportunity to
23 communicate with shareholders, while allowing Masimo unfettered opportunity to
24 do so, only serves the manifestly improper purposes of depriving shareholders of
25 important information and giving Masimo an unfair advantage in the proxy contest.

26 **D. Masimo Is Not Without Fault**

27 Nor can Masimo demonstrate, as it must to obtain *ex parte* relief, that it is
28 without fault in generating the circumstances it now seeks extraordinary relief to

1 rectify. *See Erichsen v. Cnty. of Orange*, 677 F. App'x 379, 380 (9th Cir. 2017)
2 (citation omitted) (denial of *ex parte* relief appropriate because movants did “not
3 establish they were ‘without fault in creating the crisis that requires *ex parte*
4 relief”). As noted, Masimo’s complaint about disclosure of the Court’s order on its
5 preliminary injunction motion rings hollow given that Masimo put out its own press
6 release after the Court’s final Order issued, asserting that its “lawsuit forced Politan
7 to issue several new disclosures,” identified in extensive detail, to “correct its false
8 and misleading statements and to provide material information Politan previously
9 concealed from Masimo stockholders, ISS and Glass Lewis.” (Swartz Decl., Ex. 2.)

10 Further, Masimo has it backwards. [REDACTED]

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 Masimo’s press release states that “Masimo’s lawsuit *forced* Politan to issue several
16 new disclosures, *including on the morning of the hearing*, to correct its false and
17 misleading statements and to provide material information Politan previously
18 concealed from Masimo stockholders, ISS and Glass Lewis. These false and
19 misleading statements *include*:” (Swartz Decl., Ex. 2 (emphasis added).) Now,
20 Masimo has given shareholders the false impression that Defendants were required
21 by the Court to make supplemental disclosures when, in fact, Defendants were
22 trying to remove any notion that they would permit misstatements to remain in their
23 proxy materials unless ordered to correct them.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 Finally, to the extent that Masimo asserts it is prejudiced by its inability to
6 publicly discuss the Court's order in response to Politan's statement—an assertion
7 belied by Masimo's own press release (Swartz Decl., Ex. 2)—Defendants promptly
8 provided Masimo with a set of narrow proposed redactions that would permit the
9 order to be substantially unsealed, consistent with the Court's instructions and
10 consistent with the redactions proposed by Masimo's counsel on the record before
11 the Court. (*See* Dkt. 201, Order at 50; Swartz Decl. Exs. 5-6; /9/2024 Hr'g Tr. at
12 55:8-15.) Masimo had this proposal from Defendants before it filed this *ex parte*
13 application. Given that Masimo did not respond to Defendants' proposed redactions
14 or offer any proposal of its own to promptly unseal the Court's order, and that it
15 issued its own press release before filing this application, Masimo's objection that it
16 is disadvantaged by the sealed nature of the order is both entirely disingenuous and a
17 circumstance of its own making.

18 **E. Masimo's Contempt Motion is Procedurally Improper and Failed**
19 **to Provide Defendants with Sufficient Notice**

20 Finally, Masimo's motion is procedurally improper for various reasons.
21 Masimo filed its application for *ex parte* relief without seeking an Order to Show
22 Cause. *Cf. Alcalde v. NAC Real Est. Invs. & Assignments, Inc.*, 580 F. Supp. 2d
23 969, 971 (C.D. Cal. 2008) ("Contempt proceedings are instituted by the issuance of
24 an Order to Show Cause ("OSC") why a contempt citation should not issue and a
25 notice of a date for the hearing"); *Thomas v. State Farm Gen. Ins. Co.*, 2021 WL
26 10829175, at *2 (C.D. Cal. Nov. 3, 2021) (same); *see also Pennwalt Corp. v.*
27 *Durand-Wayland, Inc.*, 708 F.2d 492, 495 (9th Cir. 1983). It also failed to provide
28 Defendants adequate notice of its intention to seek contempt sanctions. Masimo's

1 counsel provided Defendants with less than two hours of notice before filing its *ex*
2 *parte* application seeking sweeping and constitutionally dubious relief. (Swartz
3 Decl., Ex. 7.)

4 **V. CONCLUSION**

5 Defendants respectfully request that the Court deny Masimo's *ex parte*
6 application.

7
8 DATED: September 12, 2024
9

10
11 By: /s/ Bethany W. Kristovich

12 BETHANY W. KRISTOVICH

13 Attorneys for Defendants
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, certifies that this brief contains 3,321 words, which complies with the word limit of L.R. 11-6.1.

DATED: September 12, 2024

By: /s/ Bethany W. Kristovich
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